

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

Bell Atlantic f/k/a
New England Telephone and Telegraph Company

v.

City of Rochester

Docket Numbers 96-E-0160, 96-E-0165, 97-E-0123
98-E-0135, 99-E-0148, 00-E-0185

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,
PSNH'S CROSS-MOTION FOR SUMMARY JUDGMENT AND
VERIZON'S CROSS-MOTION FOR SUMMARY JUDGMENT

The defendant, City of Rochester ("City"), moves for summary judgment in cases 96-E-160, 96-E-165 and 97-E-123 arguing that the Supreme Court decision in New England Telephone and Telegraph Company v. City of Rochester, 144 N.H. 118 (1999) finally resolves the issue of whether the City's amendments to the plaintiffs'¹ pole licenses are lawful. The plaintiffs object and file cross-motions for summary judgment. For the reasons stated in this order, the City's motion for summary judgment is granted and the plaintiffs' cross-motions for summary judgment are denied.

The factual background of this case is described in detail in various orders, including the Supreme Court decision cited above.

In summary, the defendant amended the plaintiffs' pole licenses, pursuant to RSA 231:163 (1993), which permits license alterations

¹ Public Service Company of New Hampshire ("PSNH") and Verizon (formerly known as New England Telephone and Telegraph Company).

"whenever the public good requires." The amendments required the plaintiffs to pay property taxes consistent with RSA 72:23, I(b).

RSA 72:23, I(b) (Supp. 1998) states as follows:

All leases and other agreements, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property no later than the due date. All such leases and agreements shall include a provision that "failure of the lessee to pay the duly assessed personal and real estate taxes when due shall be cause to terminate said lease or agreement by the lessor." All such leases and agreements entered into on or after January 1, 1994, shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes, and shall also state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee.

After the City's appeal of an order granting the plaintiff New England Telephone and Telegraph Company's motion for summary judgment, the Supreme Court ruled that (1) the plaintiff's licenses were "leases [or] other agreements" within the meaning of RSA 72:23, I(b), and (2) the public good required the defendant to amend the plaintiff's licenses. N.E. Tel. and Tel. Co., at 121, 122.

The City filed a similar appeal of an order granting plaintiff PSNH's motion for summary judgment in Public Service Company of N.H. v. City of Rochester, Docket No. 96-E-0165. In a summary order, the Supreme Court vacated the grant of summary judgment in PSNH's favor and remanded the case to this court for

further consideration in light of the Supreme Court's decision in N.E. Tel. and Tel. Co., supra.

The City now files for summary judgment alleging the Supreme Court has squarely decided the issue of whether the pole license amendments, which require the payment of properly assessed real estate taxes, are lawful. Both plaintiffs object and argue that, notwithstanding the Supreme Court ruling, the pole license amendments are otherwise invalid because the City's action constituted a unilateral amendment of the license agreements, the amendments do not satisfy the public good, and public ways are not properly subject to assessment of real or personal property taxes.

In addition, the plaintiffs filed cross-motions for summary judgment alleging the assessment of real estate taxes is unconstitutional because the City has not imposed the same tax against other similarly situated entities who use the public ways.

The Defendant's Motion for Summary Judgment

The precise issue before the Supreme Court in N.E. Tel. and Tel. Co., was "whether the defendant [City] can require the plaintiff [Verizon] to pay real estate taxes on the land that the plaintiff uses pursuant to its pole licenses." Id. at 120. In clear and unambiguous language, the Supreme Court answered in the affirmative. Specifically, the Court "reverse[d] the trial court's order insofar as it prohibits the defendant from amending the plaintiff's pole licenses to require the plaintiff, as a condition of licensure, to pay real estate taxes assessed on the

land it uses and occupies thereunder." Id. at 122. Accordingly, this court agrees with the City that the Supreme Court has squarely decided the issue of the lawfulness of the pole license amendments. Indeed, a more clear resolution of the matter is difficult to imagine.

Notwithstanding the plain meaning of the Supreme Court's decision, the plaintiffs continue to argue that the license amendments were unlawful. First, the plaintiffs suggest that while the opinion may have resolved whether the licenses themselves constitute "agreements" sufficient to trigger the application of RSA 72:23, the Supreme Court has yet to decide whether the City's unilateral amendment of the licenses to include a provision for the payment of taxes without the plaintiffs' consent, is lawful. A close reading of the opinion, however, demonstrates that the Supreme Court has resolved this issue as well.

As the Supreme Court acknowledged, the Legislature has authorized the City to make unilateral changes in license agreements when such changes are for the public good.

The statutory scheme that permitted the plaintiff to request pole licenses represents the legislature's conditional willingness to allow the use of public property for telecommunications purposes. . . . The defendant is required to impose certain conditions on licensees, . . . and is implicitly authorized to impose other conditions on licensees consistent with the public good By conditionally granting requests for pole licenses consistent with the public good, . . . the defendant effectuates the legislature's general purpose and is able to address issues of local concern. The plaintiff, in obtaining pole licenses from the

defendant, presumably assumed the status of licensee aware of and willing to accept the conditions imposed by the defendant and the legislature.

N.E. Tel. and Tel. Co., at 121. To suggest that somehow the Supreme Court failed to consider the plaintiffs' objection to paying the tax as evidence that it did not consent to the tax, ignores the context of the opinion and the specific analysis it contains.

Nor is the plaintiffs' reliance on Appeal of Reid, 143 N.H. 246 (1998), persuasive. Since the case at bar involves a utility company, the analysis contained in Reid is inapposite. The provisions of RSA 231, which specifically govern licensing of public utilities, permit the City to unilaterally change the terms of the licensing agreement to include the payment of properly assessed real estate taxes. No such statutory authority exists to govern the type of private land lease issues addressed in Reid. Thus, the Supreme Court's conclusion in Reid that RSA 72:23, I requires a lessee to be aware of, and consent to, taxation of their leasehold is consistent with its decision in N.E. Tel. and Tel. Co. As noted above, the Supreme Court reasoned that, "in obtaining pole licenses from the [City], [Verizon] presumably assumed the status of licensee aware of and willing to accept the conditions imposed by the [City] and the legislature." N.E. Tel. and Tel. Co., at 121.

Next, the plaintiffs argue that the issue of whether the pole license amendments were required by the public good was not fully

litigated in the Supreme Court and should, therefore, be considered anew by this court. The court disagrees. In considering whether the amendments were in the public good, the Supreme Court clearly stated that "[t]he disputed amendments necessarily satisfy [the Easton] standard in that RSA 72:23, I(b) requires the [City] to implement them." N.E. Tel. and Tel. Co., at 122. Thus, the Court concluded, as a matter of law, that the license amendments satisfied the requirement that they be made in the public good. In addition, the Court found that RSA 72:23, I(b) actually required the City to include the disputed amendments in the pole licenses. The plaintiffs next argue that the amendments are unlawful because public ways are not properly subject to assessment of real or personal property taxes. This argument simply recasts the previous ones already presented to this court and squarely decided by the Supreme Court. Simply put, the City properly amended the plaintiffs' pole licenses "to require the plaintiff to pay property taxes on the land [they are] allowed to use and occupy under those licenses." N.E. Tel. and Tel. Co., at 120. Whether or not the taxes levied were "properly assessed" involves an inquiry into the mechanism for assessment rather than an overall evaluation of who is being assessed.

Finally, the plaintiffs suggest that because the court (Fauver, J.) previously denied the defendant's motion for entry of judgment in which the City raised the same arguments presented here, this court should likewise deny the motion for summary

judgment. The only factual issue in dispute that Judge Fauver recognized in denying the motion for entry of judgment was whether all the disputed pole licenses were entered into after July, 1979, thus subjecting them to the provisions of RSA 72:23. Although the court now grants the defendant's motion for summary judgment and rules the pole licenses were properly amended, it will permit the plaintiffs to argue that certain pole licenses are not subject to RSA 72:23 because they were entered into before July, 1979.

Accordingly, the defendant's motion for summary judgment is GRANTED with respect to the legality of the pole license amendments, and the plaintiffs' cross-motions for summary judgment are DENIED.

VERIZON'S CROSS-MOTION FOR SUMMARY JUDGMENT

In addition, Verizon files a motion for summary judgment alleging that the assessment of property taxes on the land the plaintiff is allowed to use and occupy under the pole licenses is unconstitutional because the City has not imposed the same tax against other utilities who also occupy the public ways.

Verizon's motion is DENIED as there are material issues of fact in dispute, including whether the same tax in fact has been assessed against similarly situated utilities, and whether other users of the public right of way occupy the land in a manner indistinguishable from Verizon's use and occupation.

In light of this court's order, the clerk shall schedule a telephonic structuring conference with the undersigned justice.

SO ORDERED.

Date: January 22, 2002

Tina L. Nadeau
Presiding Justice